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CHARLES ELMORE CH

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IN THE

Supreme Court of the United States

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant

vs.

O. L. BUNN, doing business as BUNN ELECTRIC COMPANY, et al,
Appellees

No. 333

OCTOBER TERM, 1931

JURISDICTIONAL STATEMENT

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(Under Rule 12)

(Note—The references to the record are to the paging of the record as transmitted by the Clerk of the Supreme Court of Mississippi.)

1.

The jurisdiction of the Court is sustained by Section 237 of the Judicial Code as amended (U. S. C. A. Title 28, §344(a)) wherein it is provided that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity, may be reviewed by the Supreme Court; and by the provisions of the Act of Congress of January 31, 1928, c. 14, §1, 45 Stat. 54, abolishing writ of error and providing that all relief theretofore

obtainable by writ of error should thereafter be obtainable by appeal.

2.

The date of the judgment or decree sought to be reviewed is June 15, 1931, as is shown on page 115 of the record. The date on which the application for appeal was presented is July 14, 1931, as is shown on page 124 of the record.

3.

The case is an appeal from the final judgment of the Supreme Court of Mississippi affirming the decision of the Chancery Court of Adams County, Mississippi, is an equitable action instituted by the Natchez Investment Company against the appellant, Hartford Accident & Indemnity Company, in which suit various other parties became intervenors, claiming relief against the appellant. (Record pp. 116 to 125).

The suit was instituted by the Natchez Investment Company filing its bill of complaint in equity against the appellant on a bond given by a contractor with the appellant as surety in connection with the erection of a hotel and against materialmen who had furnished materials to the contractor. (Record pp. 2 to 27.) The materialmen, though named as defendants, were really plaintiffs, as the suit was instituted for their use under the Mississippi statute involved in this case.

The prayer of the complaint was, so far as presently material, that the bond on which the appellant was surety be adjudicated to be a bond within the purview of Chapter 128, Laws of 1918, State of Mississippi, being §2598 of the Hemmingway's Code of 1927, and that judgment be rendered thereon in favor of the various materialmen who had

furnished materials in the building of the hotel. (Record, p. 11.) A copy of the bond was attached as an exhibit and made a part of the bill of complaint. (Record, Exhibit "C" to the bill of complaint, following p. 27 of the record.)

The appellant filed a demurrer in which it made the defense that, if the statute was so construed as to make it apply to a bond such as the appellant had written and as to give materialmen a right of recovery thereon, it was repugnant to the 14th Amendment of the Constitution of the United States, as depriving it and the obligee therein, respectively, of the liberty of contract, and because it was, also, a legislative attempt to make a contract between persons without their consent and to give third persons a right of action on a private contract without the consent of the contracting parties, in violation of their rights under the due-process-of-law clause and the equal-protection-of-the-law clause of the 14th Amendment of the Constitution of the United States. (Record pp. 50 to 52.)

The demurrer having been overruled in the trial court (Record p. 53), the Hartford Accident & Indemnity Company appealed to the Supreme Court of Mississippi and the Court affirmed the judgment of the trial court, holding that the bond fell within the purview of the statute and that the statute was constitutional; and remanded the case to the trial court for further proceedings. (Opinion of Supreme Court, Record pp. 60 to 73; judgment of affirmance and remand, Record p. 74.) The trial there resulted in a decree in favor of the materialmen. (Record pp. 75 to 85.) The Hartford Accident & Indemnity Company again appealed to the Supreme Court of Mississippi. The Court again affirmed the judgment of the trial court; and enlarged the scope of its former construction of the statute, as will be more fully stated later herein. (Opinion of Supreme Court, Record pp. 86 to 94; judgment and decree of Supreme Court, Record pp. 95 to 105.)

The Hartford Accident & Indemnity Company filed a suggestion of error, under the Mississippi practice (Record pp. 106 to 109), but, after argument, the Supreme Court of Mississippi rendered a third opinion and overruled the suggestion of error, thus making its former decree final. (Opinion, Record pp. 110 to 114; order overruling suggestion of error, p. 115.)

That the substantial nature of the constitutional question may more clearly appear, it is necessary to state the terms of the statute and the construction given to it by the Supreme Court of Mississippi; for it is by that construction that this Court will determine whether it is repugnant to the Constitution. It will also be necessary to state certain provisions of the bond, in order that the opinion of the Supreme Court of Mississippi may be the better understood.

The statute relates only to private work. In §1 it creates liens in favor of materialmen, etc. In §2 it forbids assignments of the contract price by contractors unless the bond provided for in §3 be given. In §3 it is provided that "when any contractor or sub-contractor entering into any contract with any person, firm or corporation for the construction of any building or work or the doing of any repairs shall enter into a bond with such person, firm or corporation guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties may insert therein, such bond shall also be subject to the additional obligation that such contractor or sub-contractor shall promptly make payment to all persons furnishing labor or material under said contract," and that though the bond omit this additional obligation, persons furnishing labor or material shall have a right of action on the bond to the same extent as if the omitted obligation had been contained therein.

The bond, which was carefully drawn to prevent its falling within the purview of the statute, did not undertake to

"guarantee the performance of the contract," but only "to indemnify the obligee against loss or damage directly caused by failure of the principal to perform the contract;" and this indemnity was granted only on the express condition that it should be void if the obligee breached the contract with the contractor, or if the obligee consented to any assignment of the contract price or if the obligee, after notice of any lien, failed to withhold the funds due the contractor. It was also expressly provided in the bond that it was not to cover any provision of the contract for the furnishing of any bond; also that no suit should be maintained on the bond by or for the use of any one except the obligee. (See copy bond, Exhibit "C" to complaint following p. 27 of Record.)

On the first appeal the Supreme Court construed the statute as applicable to such a bond; but decided against the constitutional attack on the statute on account of its alleged arbitrary interference with the liberty of contracting as to purely private business; pointing out that the statute left it purely optional with the landowner whether he would take the bond, and also pointed out that the statute allowed the parties to the bond to insert therein such provisions as they saw fit. (Record pp. 68 to 73.)

When the case came back on the second appeal and it appeared that the conditions of the bond had been breached by the obligee, that the obligee had breached the underlying contract, had participated in assignments of the purchase price and had failed to withhold funds after notice of liens, the Supreme Court enlarged the scope of the statute by the holding that while the statute permitted the parties to the bond to insert such provisions as they saw fit, that such provisions would not be enforceable against the materialmen. (Record pp. 86 to 94.) This was adhered to in the rehearing granted on the suggestion of error. (Record pp. 110 to 114.)

The net effect of the three decisions is that while a landowner has the liberty of taking no bond from a contractor, under penalty of having a lien on his property, still he and a surety company have not the liberty of so contracting as to indemnify the landowner against direct loss and damage from the failure of the contractor to perform the contract, upon conditions mutually satisfactory to them, without also giving to the contractor's creditors for materials an unconditional right of action on the contract of suretyship.

There is also the holding that the statute has the effect of forbidding the parties to the bond, which the landowner is seeking for his special protection, from contracting that the surety on the bond shall not be liable to third persons not parties to the contractual covenants; even though the contract relates to purely private subject-matter, not connected with any business affected with public use or interest.

The attack on the statute is made in the appellant's demurrer to the bill of complaint; so that it has not been thought necessary or proper to bring to this Court all the volumes of the record taken on the trial in the lower court. But it has been thought necessary to bring here the opinions of the Supreme Court on the second appeal and the suggestion of error; for it is from the construction of the statute in these subsequent opinions that its deprivation of the liberty of private contracting most clearly appears.

The assignments of error in the record (Record pp. 118 to 123) make point that the statute as written and as construed by the highest court of the State of Mississippi is repugnant to the due-process-of-law clause and the equal-protection-of-the-law clause of the 14th Amendment of the Constitution of the United States, because of its arbitrary interference with and deprivation of the rights of private contract as to persons falling within its terms and purview, as thus construed.

4.

AUTHORITIES CITED TO SUSTAIN THE JURISDICTION

The statute (Judicial Code §237, U. S. C. A. Title 28, §344(a)) is deemed adequate authority to sustain jurisdiction generally, since the case is literally within its terms.

That the constitutional question is substantial and not frivolous:

The state courts have usually held such provisions as are contained in the Mississippi statute to be unconstitutional:

Gibbs v. Tally, 133 Cal. 373; 65 Pac. 970.

Montague v. Furness, 145 Cal. 205; 78 Pac. 640.

Williams v. Baldwin (Tex.) 228 S. W. 554.

Hess v. Denham L. Co. (Tex.) 218 S. W. 162.

Stinson Mill Co. v. Braun, 136 Cal. 122; 57 L. R. A. 726.

Kelly v. Johnson, 251 Ill. 135; 95 N. E. 1068; 36 L. R. A. (N. S.) 573.

That this Court has jurisdiction to declare void State statutes which unreasonably infringe upon the liberty of contracting as to private subject-matter, see:

Tyson v. Banton, 273 U. S. 418; 71 L. ed. 718.

Ribnick v. McBride, 277 U. S. 350; 72 L. ed. 913.

Woolf v. Industrial Court, 262 U. S. 522; 57 L. ed. 1103.

Smith v. Cahoon (decided by U. S. Supreme Court May 25, 1931).

Near v. State (decided by U. S. Supreme Court June 1, 1931.

The right to contract about his own affairs is a part of the liberty of the individual protected by the due-process clause of the Federal Constitution.

Adkins v. Children's Hospital, 261 U. S. 525; 67 L. ed. 785; 24 A. L. R. 1238, and cases cited in the course of the opinion.

(It is to be noted that this case does not fall within the second exception stated to the general rule as announced in the opinion just cited, "Statutes relating to contracts for the performance of public work," as the work in this case was purely private.)

In determining the constitutionality of a statute the Supreme Court tests it by its operation and effect accordingly as the State court has construed it.

Near v. Olson (decided by U. S. Supreme Court June 1, 1931) and cases cited in the opinion.

No question as to the constitutionality of the statute so far as it imposes a lien on property is involved. The constitutional point here made is that the statute deprives the landowner and the surety company of the liberty of contracting for the indemnification of the former against direct loss to him, under special conditions agreed on between the parties, except upon the condition that the surety company at the same time shall assume an unconditional liability to third persons (the materialmen); even though the landowner is willing to have the lien of materialmen attach to

his property; and though the parties to the contract of indemnity expressly agree that it shall not inure to the benefit of such third persons.

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